Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Federal-State Joint Board on	)	WC Docket No. 09-197
Universal Service	)	
	)	
Petition by NE Colorado Cellular, Inc.,	)	
d/b/a Viaero Wireless	)	
for Commission Agreement in	)	
Redefining Certain Service Areas of	)	
Incumbent Rural Telephone Companies	)	
In the State of Kansas Pursuant to	)	
47 C.F.R. Section 54.207(c)	)	

PETITION FOR RECONSIDERATION

Susan B. Cunningham
SNR Denton US LLP
4520 Main Street
Suite 1100
Kansas City, Missouri 64111-7700
(816) 460-2400

Attorney for: NE COLORADO CELLULAR, INC.
d/b/a VIAERO WIRELESS

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Table of Contents

SUMMARY

NE Colorado Cellular, Inc., d/b/a Viaero Wireless ("Viaero") respectfully requests that the Wireline Competition Bureau ("Bureau") reconsider its Public Notice initiating a proceeding to consider Viaero's request for Commission concurrence in redefining certain Kansas rural incumbent local exchange carriers ("LECs") service areas pursuant to the process set forth in Section 54.207(c) of the Commission's Rules ("Request"). Through its Public Notice, the Bureau has effectively denied Viaero's Request by indefinitely delaying the availability of support in the areas in question. The Bureau's decision also has frustrated the intent of the Communications Act of 1934 ("Act") by rejecting the well-considered redefinition proposal of the Kansas State Corporation Commission ("Kansas Commission") without offering any justification.

Indeed, the Bureau's decision finds no justification under existing law and precedent. Viaero's Request met all applicable requirements for service area redefinition under the FCC's rules, and the facts of the Request fell cleanly within Commission precedent. The Request demonstrated that redefinition was warranted under the Commission's competitively neutral universal service policies, and it constituted precisely the same relief granted to similarly situated carriers by the Commission and several states. The Request satisfied the analysis provided to the Commission by the Federal-State Joint Board on Universal Service ("Joint Board"), in that it (1) would not involve the payment of uneconomic support or cream skimming opportunities, (2) duly recognizes the special status of rural carriers under the Act, and (3) would not impose undue administrative burdens on incumbent LECs. Thus, the Request met the governing standards under Section 214(e)(5) of the Act, which provides for the redefinition of rural ILEC service

areas jointly by the state and the Commission "after taking into account the recommendations of [the Joint Board.]"

The Bureau's effective denial of the requested redefinition similarly cannot be justified as a cautionary move in advance of fundamental reforms to the high-cost Universal Service program. The redefinition of the ILEC areas at issue would not impede the Commission's Connect America Fund ("CAF") or universal service reform goals. Indeed, on the same day the Bureau issued the Public Notice, the Commission adopted its *CAF Order* which included provisions to freeze competitive eligible telecommunications carrier ("CETC") support and phase it down to zero over four years. The Commission's CAF and USF reform framework have mechanisms to absorb and phase down newly available support, whether arising from new state commission ETC designations or from the redefinition process. These mechanisms, in addition to the existing cap on CETC support, will ensure that redefinition will not increase burdens on the program. Thus, the Commission's broadband and USF reforms offer no justification for delaying or denying support to rural ILEC areas under the existing rules.

Accordingly, Viaero urges the Bureau to reconsider its decision and grant the requested redefinition without delay.

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PETITION FOR RECONSIDERATION

NE Colorado Cellular, Inc., d/b/a Viaero Wireless ("Viaero"), by counsel and pursuant to Section 405(a) of the Communications Act of 1934 ("Act")[1] and Section 1.106(a)(1) of the Commission's Rules ("Rules"), respectfully requests that the Wireline Competition Bureau ("Bureau") reconsider its *Notice*[2] initiating a proceeding to consider Viaero's request for Commission concurrence in redefining certain Kansas rural incumbent local exchange carriers ("LECs") service areas pursuant to the process set forth in Section 54.207(c) of the Commission's Rules ("Request").[3]

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[1] 47 U.S.C. § 405(a).

[2] *Wireline Competition Bureau Initiates Proceeding to Consider NE Colorado Cellular, Inc. d/b/a Viaero Wireless Petition for Agreement in Redefining the Service Areas of Rural Telephone Companies in Kansas,* Public Notice, WC Docket No. 09-197, DA 11-1803 (Wireline Comp. Bur. Rel. Oct. 27, 2011) ("*Notice*").

[3] NE Colorado Cellular, Inc., d/b/a Viaero Wireless Petition for Commission Agreement in Redefining Certain Service Areas of Incumbent Rural Telephone Companies in the State of Kansas Pursuant to 47 C.F.R. Section 54.207(c), WC Docket No. 09-197 (filed July 22, 2011) ("Request").

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I. INTRODUCTION

Viaero was granted eligible telecommunications carrier ("ETC") status by the Kansas State Corporation Commission[4] pursuant to Section 214(e)(2) of the Communications Act of 1934.[5] In its designating order ("*KCC Order*"), in addition to designating Viaero in non-rural incumbent LEC areas and in certain rural incumbent LEC areas, the Kansas Commission conditionally designated Viaero in several rural incumbent LEC areas,[6] which required redefinition pursuant to Section 54.207 of the FCC's rules.[7] The *KCC Order* therefore proposed to redefine each Rural Company service area so that each wire center constitutes a separate service area. The *KCC Order* specified that Viaero's designation in the Rural Company areas would take effect only upon a grant of concurrence by the FCC.[8] The proceedings at the state level provided all affected parties with an opportunity to comment on the proposed redefinition, but "[n]o public comments were received."[9] There was no opposition to Viaero's proposed service area redefinitions from any of the affected rural incumbent LECs or from any competitor.

On July 22, 2011, Viaero filed its Request for FCC concurrence in the Kansas Commission's redefinition proposal. Pursuant to the subsequent Public Notice, the requested concurrence would be deemed automatically granted if the Commission took no action before

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[4] *Petition of NE Colorado, Inc. d/b/a Viaero Wireless, for Designation as an Eligible Telecommunications Carrier 47 U.S.C. 214(e)(2) and for Redefinition of Rural ILEC Service Areas*, Docket No. 09-NECZ-747-ETC, Order Designating Viaero Wireless as an ETC in Certain AT&T and RLEC Exchanges and Granting in Part and Denying in Part Request for Redefinition of Certain Rural Study Areas, adopted June 4, 2010 ("*KCC Order*"), at 6 (paras. A, B & C). *See* Letter from Christine Aarnes, Chief of Telecommunications, KCC, to Karen Majcher, Universal Service Administrative Company, July 2, 2010, at 1 (indicating that the Kansas Commission had "determined that Viaero has met the federal requirements and that it is in the public interest to designate Viaero as an ETC").

[5] 47 U.S.C. § 214(e)(2).

[6] The ILECs in question are Golden Belt Telephone Association ("Golden Belt"), Wheat State Telephone Company, Inc. ("Wheat State"), Tri-County Telephone Association, Inc. ("Tri-County"), S&T Telephone Company ("S&T"), and Twin Valley Telephone, Inc. ("Twin Valley") (collectively, the "Rural Companies").

[7] *KCC Order* at 6 (para. D).

[8] *Id.* at 4 (para. 12).

November 2, 2011. No comments were filed, and at no point did any party oppose Viaero's Request. Nonetheless, on October 27, 2011 – the same day the Commission held its open meeting to adopt an order establishing a framework for funding broadband and reforming the universal service and intercarrier compensation regimes – the Bureau issued the *Notice* announcing the initiation of a proceeding to consider Viaero's Request, thus preventing the redefinition from taking effect automatically.

II. DISCUSSION

The Bureau's decision to initiate a proceeding finds no justification under the statute, Commission rules, or applicable Commission precedent. The Kansas Commission's decision to redefine certain specified rural incumbent LEC service areas, as requested by Viaero, met all applicable Commission requirements. The Request demonstrated that redefinition was warranted under the Commission's competitively neutral universal service policies, and it constituted precisely the same relief granted to similarly situated carriers by the Commission and several states. The Request satisfied the analysis provided to the Commission by the Federal-State Joint Board on Universal Service ("Joint Board"), in that it (1) would not involve the payment of uneconomic support or cream skimming opportunities, (2) duly recognizes the special status of rural carriers under the Act, and (3) would not impose undue administrative burdens on incumbent LECs. Thus, the Request met the governing standards under Section 214(e)(5) of the Act, which provides for the redefinition of rural ILEC service areas jointly by the state and the Commission "after taking into account the recommendations of [the Joint Board.]"[10]

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[9] *KCC Order* at 2 (para. 3).

[10] 47 U.S.C. § 214(e)(5).

The record, therefore, demonstrates that the service area redefinitions adopted by the Kansas Commission fully comport with federal requirements. Accordingly, the Bureau had no basis to decline to grant the Request.

A. Viaero Demonstrated that the Kansas Commission's Proposed Redefinitions Will Promote Federal Universal Service Objectives.

Viaero's Request explained that the Commission and many state commissions have affirmed that ETC service areas should be defined in a manner that removes obstacles to competitive entry.[11] Viaero explained the redefinition requested in this proceeding would enable Viaero to make the network investments necessary to bring competitive services to consumers throughout its licensed service area, and that redefinition would remove a major obstacle to competition, consistent with federal telecommunications policy.[12]

B. Viaero Demonstrated that the Proposed Redefinition Satisfies the Three Joint Board Factors Under Section 54.207(c)(1) of the Commission's Rules.

The Kansas Commission's proposed redefinition, and Viaero's Request, fully complied with the Commission's requirements for redefinition by providing "an analysis that takes into account the recommendations of any Federal-State Joint Board convened to provide recommendations with respect to the definition of a service area served by a rural telephone

[11] *See, e.g., First Report and Order,* 12 FCC Rcd at 8882-83 (footnotes omitted):

> [U]niversal service policy objectives may be best served if a state defines rural service areas to consist only of the contiguous portion of a rural study area, rather than the entire rural study area. We conclude that requiring a carrier to serve a non-contiguous service area as a prerequisite to eligibility might impose a serious barrier to entry, particularly for wireless carriers. We find that imposing additional burdens on wireless entrants would be particularly harmful to competition in rural areas, where wireless carriers could potentially offer service at much lower costs than traditional wireline service.

[12] *See* 1996 Act, Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., at 113 (emphasis added) (stating that the 1996 Act was designed to create "a pro-competitive, de-regulatory national policy framework" aimed at fostering rapid deployment of telecommunications services to all Americans "by opening *all telecommunications markets* to competition").

company."[13] Specifically, Viaero's Request demonstrated that the Kansas Commission's proposed redefinition satisfied the three factors the Joint Board recommended for consideration by states and by the Commission when reviewing a request to redefine a LEC's service area.[14] Each of these factors is discussed in turn below.

1. Minimizing Potential for Cream Skimming.

Viaero explained that it made no attempt to single out low-cost exchanges, to the exclusion of other exchanges, in any of the subject service areas. On the contrary, Viaero explained that the Kansas Commission designated Viaero for an ETC service area that is based on the geographic limitations of its licensed service territory, and that would not create cream-skimming opportunities for Viaero.[15]

Viaero also explained that the Commission has clarified that cream-skimming opportunities arise when an ETC seeks designation in a "disproportionate share of the higher-density wire centers" in an incumbent LEC's service area.[16] The Request also noted that opportunities for receiving uneconomic levels of support are diminished by the ability of rural incumbent LECs to disaggregate support below the study-area level.[17]

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[13] 47 C.F.R. § 54.207(c)(1).

[14] *Joint Board Recommended Decision*, 12 FCC Rcd at 179-80, *cited in Federal-State Joint Board on Universal Service, Virginia Cellular, LLC*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 1563, 1582 (2004) ("*Virginia Cellular*").

[15] *See KCC Order* at 4 (paras. 11-12).

[16] *ETC Report and Order*, 20 FCC Rcd at 6392:

> By serving a disproportionate share of the high-density portion of a service area, an ETC may receive more support than is reflective of the rural incumbent LEC's costs of serving that wire center because support for each line is based on the rural telephone company's average costs for serving the entire service area unless the incumbent LEC has disaggregated its support.

[17] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, 16 FCC Rcd 11244, 11302-09 (2001) ("*Fourteenth Report and Order*").

Most importantly, Viaero's Request demonstrated that the proposed redefinition meets the Commission's criteria in its analysis of population density as a means of determining the likelihood of creamskimming. Viaero explained that, in all but two of the Rural Company areas, the Staff of the Kansas Commission had found that Viaero was proposing to serve the lower-density, higher-cost portions of the study area, and that creamskimming was therefore not a concern. In the two remaining areas – S&T and Twin Valley – the population density inside Viaero's proposed ETC area was slightly higher than the remaining portions of the respective study areas. Nonetheless, Staff concluded that creamskimming was unlikely because:

> Viaero is not proposing to serve only the highest-density, lowest-cost exchanges. Rather, Viaero will be providing service to a mix of high-cost and low-cost customers. Staff believes it is unlikely that allowing Viaero to provide service below the study area level will place [S&T or Twin Valley] at an unfair disadvantage.[18]

The Kansas Commission adopted Staff's recommendations in their entirety.[19]

Although the Kansas Commission found that creamskimming was not a concern in S&T and Twin Valley areas, Viaero's Request acknowledged that the FCC might be reluctant to grant its concurrence where the population density inside the proposed ETC area is even slightly higher than in the remaining portions of a study area. In order to address any creamskimming concerns the FCC may have regarding S&T and Twin Valley, Viaero agreed, after consulting with Kansas Commission staff, to withdraw its eligibility from certain wire centers with relatively high population densities. Specifically, Viaero agreed not to serve as an ETC in the Levant wire center in the S&T study area or in the Riley wire center in the Twin Valley study area. With these wire centers removed, the overall population density in the portions of the S&T

[18] KCC Staff Report at 18, 20.

[19] *See KCC Order* at 6 (para. 19).

and Twin Valley study areas within Viaero's ETC area is lower than in the remaining portions.[20] As a result, Viaero would now serve the lower-density, higher-cost portions of each of the Rural Companies' study areas.

Viaero provided the following summary of the population density analyses conducted by the KCC Staff and adopted by the Kansas Commission, as modified to reflect Viaero's withdrawal from the Levant and Riley wire centers:

> ***Golden Belt***.—The average population density for the 10 Golden Belt wire centers that Viaero will serve is 5.35 per square mile ("psm"), compared to 7.04 for the wire centers in which Viaero will not provide service. The average population density for the entire Golden Belt study area is 6.10 psm. Because Viaero is proposing to serve the lower-density portion of the study area, Viaero will not be able to engage in creamskimming in Golden Belt areas.
>
> ***Tri-County***.—The average population density for the six Tri-County wire centers that Viaero will serve is 9.61 psm, compared to 14.52 for the wire centers in which Viaero will not provide any service. In addition, the average population density per square mile for the entire Tri-County study area is 10.54 psm. Because Viaero is proposing to serve the lower-density portion of the study area, Viaero will not be able to engage in creamskimming in Tri-County areas.
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> ***Twin Valley***.—As modified herein, the average population density for the eight Twin Valley wire centers that Viaero will serve is 14.26 psm, compared to 14.97 for the wire

[20] Viaero's withdrawal from certain wire centers to reduce the likelihood of an FCC finding of creamskimming is consistent with FCC precedent. *See, e.g.,* United States Cellular Corporation, Petition for Commission Agreement in Redefining the Service Areas of Rural Telephone Companies in Missouri, CC Docket No. 96-45 (filed Jan. 18, 2007) at p. 3 n.9; *Comment Sought on a Petition by USCOC of Greater Missouri, LLC d/b/a U.S. Cellular for Commission Agreement in Redefining the Service Areas of Rural Telephone Companies in the State of Missouri,* Public Notice, DA 08-181 (rel. Jan. 29, 2008).

centers that Viaero will not be serving. The average population density for the entire Twin Valley study area is 14.69 psm. Because Viaero is proposing to serve the lower-density portion of the study area, Viaero will not be able to engage in creamskimming in Twin Valley areas.

S&T.—As modified herein, the average population density for the six S&T wire centers that Viaero will serve is 3.72 psm, compared to 4.43 for the wire centers that Viaero will not be serving. The average population density for the entire S&T study area is 3.96 psm. Because Viaero is proposing to serve the lower-density portion of the study area, Viaero will not be able to engage in creamskimming in S&T areas.

Wheat State.— The KCC Staff determined that the average population density for the two Wheat State wire centers that Viaero will serve is 9.08 psm, compared to 23.96 for the wire centers in which Viaero will not provide service. The average population density for the entire Wheat State study area is 19.00 psm. Because Viaero is proposing to serve the lower-density portion of the study area, Viaero will not be able to engage in creamskimming in Wheat State areas.

In each case described above, Viaero proposed to serve the less densely populated portion of the study area. Thus, even under a conservative reading of the Joint Board's recommendations, the requested redefinition is unlikely to result in creamskimming.[21]

In sum, Viaero demonstrated that it is not proposing to serve "only the low-cost, high revenue customers in a rural telephone company's study area."[22] This fact, in conjunction with

[21] *See Federal-State Joint Board on Universal Service, Advantage Cellular Systems, Inc.*, CC Docket No. 96-45, 19 FCC Rcd 20985, 20994 (2004); *Virginia Cellular, supra,* 19 FCC Rcd at 1578-79.

[22] *See Virginia Cellular, supra,* 19 FCC Rcd at 1578.

the availability of disaggregation to the affected incumbent LECs, demonstrated that cream skimming would not result from a grant of the Request.

2. Considering the Special Status of Rural Incumbent Carriers.

Viaero's Request demonstrated that the Kansas Commission's proposed redefinition complied with the Joint Board recommendation that the Commission and the states should consider the rural carrier's special status under the 1996 Act.[23]

3. Recognizing Administrative Burdens on Rural Incumbent Carriers.

Viaero also demonstrated that the Kansas Commission's redefinition proposal satisfied the Joint Board's recommendation that the Commission and the states should consider any administrative burdens a rural incumbent LEC might face as a result of a study area redefinition.[24] Viaero explained that the redefinition proposal was made solely for ETC designation purposes, and that defining the service areas as proposed would not have any impact on the way the affected rural incumbent LECs calculate their costs, but is requested solely for the purpose of enabling Viaero to begin receiving high-cost support in those areas in the same manner as the rural incumbent LECs.

In addition, Viaero explained that, in the event any of the affected rural incumbent LECs choose to disaggregate support out of concerns about cream skimming by Viaero or any other competitive carrier, this disaggregation of support should not represent an undue administrative burden.

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[23] *See Joint Board Recommended Decision, supra,* 12 FCC Rcd at 180.

[24] *See Joint Board Recommended Decision*, 12 FCC Rcd at 180.

C. Viaero Demonstrated that the Proposed Redefinition Is Consistent With the Commission's "Minimum Geographic Area" Policy.

Finally, Viaero explained that its designated ETC service area does not include any partial rural incumbent LEC wire centers. Accordingly, the instant request for concurrence with redefinition to the wire center level, and not below the wire center level, is consistent with Commission policy to avoid designating competitive ETCs in portions of rural incumbent LEC wire centers.

D. The CAF Order Provides No Justification for Initiating a Proceeding.

The Bureau's effective suspension of the requested redefinition cannot be justified as a cautionary move in advance of fundamental reforms to the high-cost Universal Service program. The redefinition of the ILEC areas at issue would not impede the Commission's Connect America Fund ("CAF") or universal service reform goals. On the contrary, suspending the Request only jeopardizes Viaero's ability to compete for funding under the newly adopted programs.

On the same day the Bureau issued the *Notice*, the Commission adopted its *CAF Order* which included provisions to freeze competitive eligible telecommunications carrier ("CETC") support and phase it down to zero over four years.[25] Starting January 1, 2012, each CETC will have its support frozen within each study area at the level of support it received during all of 2011. Then, starting July 1, 2012, each CETC's frozen support will be phased down by 20 percent per year until it reaches zero on July 1, 2016.

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[25] *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund,* WC Docket No. 10-90 et al., FCC 11-161, Report and Order and Further Notice of Proposed Rulemaking (adopted Oct. 27, 2011, rel. Nov. 18, 2011) ("*CAF Order*").

These measures ensure that as CETCs become eligible for additional support – whether through new designations or through redefinition – the Commission's goals of transitioning existing streams of support to the new programs will proceed uninterrupted. Had Viaero's Request been permitted to take effect automatically on November 2, Viaero's frozen support in the Rural Company areas would have been de minimis as it would have spread out two months' worth of support – roughly $16,000 – over a year. The resulting frozen support amount for all of the redefined areas would have been approximately $1,300 per month.

Moreover, the interim cap on CETC support that is currently in place provides an added measure of protection against even this modest support increase as the Commission continues the transition to new programs. The approximately $8,000 per month in additional support is added to the statewide CETC support total that is run through the cap calculation to yield a statewide cap factor that would result in moderately steeper cap reductions for all CETCs in Kansas. Thus, a grant of the Request would not have resulted in *any* increased draw on the high-cost USF program.

Given the protections to the Commission's programs afforded by the CETC cap, the support freeze, and the phase-down, the suspension of Viaero's Request could not be justified as means of protecting the viability of funding for the new programs adopted in the CAF order. In fact, rather than provide protection, the denial of an automatic grant places in jeopardy Viaero's ability to participate in the new programs in the areas in question. In the portions of the CAF Order dealing with the Phase I Mobility Fund, the Commission determined that in order to be eligible to seek funding, companies must already "be ETCs in the area in which they seek Mobility Fund support."[26] If the Bureau does not reverse its decision on reconsideration, then

[26] *CAF Order* at para. 391.

its decision will have the effect of denying Viaero the ability to participate in Phase I Mobility Fund, and possibly Phase II, in the Rural Company areas.

To impede a redefinition proposal that fully complies with existing standards would make no sense as a cautionary move. Instead, such an action unfairly and negatively affects Viaero's ability to obtain funding under the Commission's newly adopted mechanisms.

III. CONCLUSION

The relief proposed in Viaero's Request is exactly the same in all material respects as that granted by the Commission and numerous state commissions throughout the country. Existing rules and precedent, which the Commission is duty-bound to follow, necessarily compel a grant of the proposed redefinition. Accordingly, Viaero requests that the Bureau reconsider its decision to initiate a proceeding, and issue an order granting its concurrence with the Kansas Commission's proposed redefinition.

Respectfully submitted,

Susan Cunningham /lcs/

Susan B. Cunningham
SNR Denton US LLP
4520 Main Street
Suite 1100
Kansas City, Missouri 64111-7700
(816) 460-2400

Attorney for NE Colorado Cellular, Inc.,
d/b/a Viaero Wireless

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